

Trans Air Supply Company, Inc. and Charles W. Ryan, Jr. Case 12-CA-9026

July 27, 1981

DECISION AND ORDER

On November 25, 1980, Administrative Law Judge J. Pargen Robertson issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief to the exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found that Respondent discharged the Charging Party, Charles W. Ryan, Jr., on February 12, 1980, but that Ryan's discharge was not unlawful because it was not a result of activity protected by Section 7 of the National Labor Relations Act. The General Counsel has excepted to this finding, asserting that Ryan was discharged because he engaged in protected concerted activities by complaining to Respondent that fans needed to remain on in order to ventilate the work premises, and that his discharge was therefore violative of Section 8(a)(1) of the Act. For the reasons set forth below, we find merit in the General Counsel's exception.

Respondent is engaged in the business of selling and overhauling airplane engines and parts at its Miami, Florida, facility. Ryan was employed by Respondent in June 1979, and worked as a machinist in Respondent's master rod department from that time until February 12, 1980, when he was discharged by Respondent. At the time of his discharge, Ryan was Respondent's leadman in the master rod department, where he and three other employees rebuilt master rods for commercial and government aircraft engines. Ryan testified without contradiction that employees in this department work in a partitioned-off area measuring approximately 12 feet by 12 feet located in Respondent's machine shop, which is otherwise an open area. The partitions enclosing the master rod department are about 4 or 5 feet high, except for the partition on the west side which is about 8 feet tall. A small fan, which is not an exhaust fan but is used for cooling purposes in appropriate weather, is located within the master rod work area.

Other fans, measuring approximately 4 feet in diameter, are located on the east and west walls of Respondent's machine shop. According to the testimony of Respondent's machine shop foreman, Clyde T. Hughes, two fans located on the east wall

bring air into the shop, and five fans on the west wall are exhaust fans, blowing air out of the shop. Foreman Hughes stated that four of the five west wall exhaust fans are directly above his shop, with the switches located in his shop. Hughes further stated that any movement of air in the building is controlled by these fans.

As set forth by the Administrative Law Judge in his summary of testimonial evidence, Ryan and other master rod department employee witnesses testified that, in late 1979 or early 1980, they began to experience discomfort because of smoke or fumes which built up in their work area when the exhaust fans were not in operation. Ryan stated that a welder was located behind one of the partition walls, and smoke from the welding operations would rise and fall on the partitioned-off area; on another side was a spray booth where kerosene was being used, and fumes would emanate from the spray booth towards the master rod department enclosure. Fumes from coolants and other types of fluids used to cool the metal being machined by Ryan and his coworkers also sometimes built up. Ryan stated that he and others began experiencing sore throats, runny noses, and burning eyes. At least three employees—Ryan, master rod department employee John Austin, and machine shop employee Mike Divino—had gone home early on various occasions because the smoke or fumes made them physically ill.

Ryan, as leadman in the master rod department, was requested by fellow workers to speak to management about the necessity for keeping the exhaust fans on so that smoke and fumes would be cleared from their work area. In November, Ryan registered complaints with Foreman Hughes, Plant Manager Kendrick, and Safety Director Hart.¹ As colder weather approached, some employees at Respondent's facility did not want the exhaust fans on because their ventilating function caused the open machine shop to be uncomfortably cold. Thus, master rod department employee Nico Lauw testified that for approximately 2 weeks prior to February 12, when Ryan was discharged, as soon as everybody started work the master rod shop would get very, very smoky, and one of the employees would turn the fans on because there is no appointed person to do that. But, as soon as they were turned on, the fans would be turned off again. Lauw said that he had himself complained to Foreman Hughes about the conditions. Fellow master

¹ There is some disagreement as to when Ryan first commenced his complaints on the employees' behalf, and whether earlier complaints asserted to have been lodged by Ryan during the fall of 1979 related to the smoky conditions in the work area or to the need to exhaust odors from cleaning solutions used in other parts of the shop.

rod department employee John Austin testified that he had complained to Respondent's plant manager, John Kendrick, as well, and had twice asked leadman Ryan to go to Kendrick about the problem. In any event, it is undisputed that the employees considered the smoke and fume conditions in the plant to be a serious problem.

Respondent, according to the testimony of Foreman Hughes, had no policy concerning the operation of the fans. Hughes testified that he generally left it up to the people in his shop to turn the fans on and off as they saw fit. Ryan stated that Hughes told him that he (Hughes) could not regulate the fans because people would turn them off after he turned them on, and that the employees would just have to fight it out among themselves. Ryan further testified that, when he complained to Kendrick about the fans in December,² Kendrick told him there was no way he could regulate the fans and then said, "Look, if you don't like it you can leave. The fumes aren't that bad."

The controversy regarding the operation of the fans came to a head in early February. Hughes testified that on February 5, 1980, Kendrick directed him to canvass those working in the machine shop to see if they wanted the fans on. The testimony of Kendrick indicates that he caused the vote to be taken in response to complaints of Ryan on that date. Hughes stated that he asked all the employees available in his shop at that time, who numbered 17, if they wanted the fans on. A majority of the employees said yes. Hughes stated that he interpreted the employees' response to his February 5 poll to apply to that day only, inasmuch as he did not specify "every day" when he asked the employees if they wanted the fans on. Following the vote, Hughes turned on two fans on the east wall and four on the west wall. Some of these fans were subsequently turned off by someone.³

Ryan was terminated on February 12 after a heated discussion concerning the operation of the fans occurred between Kendrick and himself. Varying versions of the events of that day are set forth in the Administrative Law Judge's Decision.

² Ryan's recollection of the dates of some incidents described varied from that of other witnesses. As noted by the Administrative Law Judge, Ryan placed certain conversations in December 1979 on direct examination, but admitted on cross-examination that they could have occurred in February 1980. In so doing, Ryan commented that it had been 6 months since the occurrence of events to which he was testifying. The Administrative Law Judge did not, however, find this a basis for discrediting Ryan.

³ One machine shop employee, 78-year-old Domingo Fernandez, left work early that day because of the cold. Hughes testified that he had reviewed a newspaper in preparation for his testimony, and that it indicated the temperature on February 5, when the vote was taken, to have been 42 degrees with a wind velocity approaching 50 knots out of the northeast. Master rod department employees Ryan and Austin also left work ill before the end of the workday.

According to the credited testimony of Respondent's witnesses, Hughes and Kendrick, Ryan was involved in a confrontation with employee Domingo Fernandez on that morning regarding whether or not the fans should be on, and it was that incident which precipitated Kendrick's coming to the machine shop area. Hughes testified that Ryan wanted the fans operating because it was smoky, so Hughes went to the weld shop and turned on the fan immediately above Ryan. Hughes stated that when he came back, Ryan and employee Domingo Fernandez were "facing each other off." Fernandez, according to Hughes, does not speak much English, and there was a lot of loud talking between Fernandez and Ryan. Hughes told the two employees to break it up and to go back to work. Hughes further testified that Ryan wanted to carry on a conversation with him, and that Ryan wanted the fans on. While he was trying to get both employees to return to their work, Hughes stated, Kendrick arrived and began a conversation with Ryan. Hughes left at that point and returned to some paperwork which he had to get completed. Kendrick then told Ryan that only one fan would be left on, that he had to consider older senior employees as well as Ryan's requests, and that he "had had enough difficulty with the fans and [I] was really pretty tired of hearing about them."⁴ Kendrick accompanied Ryan back to Ryan's own work area, where the actual discharge occurred.

Kendrick denied that Ryan was fired, claiming instead that the Charging Party voluntarily quit. The Administrative Law Judge rejected this contention, noting that three employee witnesses were present when Kendrick fired Ryan, that Foreman Hughes' testimony regarding that issue was evasive, and that Kendrick's testimony that he did not fire Ryan was unbelievable.⁵ He thus concluded

⁴ Kendrick testified specifically that neither Fernandez nor Ryan was fired for threatening to fight, and that neither employee received a warning or a reprimand for the incident.

⁵ Fellow master rod department employees Lauw and Austin each overheard Kendrick's firing of Ryan. Thus, Lauw testified as follows:

Mr. Kendrick came in and starting [sic] talking to Charles [Ryan] about how Charles was causing trouble again, and he was tired of seeing Charles causing trouble.

He wanted to know what was going on this time, and Charles said that last time that Mr. Kendrick would not turn the fans on, so he had to go out and have a vote to have it done.

This time, he didn't even want to try and turn it on again.

Then Mr. Kendrick was telling Wes [Ryan] that if he didn't like it, he could pick his toolbox up and leave and he'd be fired.

And Charles said he didn't want to leave because he liked working there, and he was the only one doing good work for Clyde Hughes.

And after that, the next thing I heard was: Mr. Kendrick said Charles was fired anyway.

Austin's recollection of the firing is as follows:

Q. What did you hear Mr. Kendrick and Charles talk about to the best of your recollection?

Continued

that Respondent discharged Ryan. He found, however, that the discharge occurred solely for the reason that Ryan persisted in arguing with Kendrick after he had almost fought with another employee, and after he had been told by both Hughes and Kendrick to return to work.

We agree with the Administrative Law Judge's conclusion that Respondent discharged Ryan. We cannot, however, agree with his conclusion that the General Counsel failed to prove that Ryan's concerted activities led to or contributed to his discharge. Ryan's attempt to improve the common conditions of himself and others working in unventilated areas, in the face of Respondent's repeated position that it could do nothing about the problem complained of because employees turned the fans off each time Ryan or other master rod department employees turned them on, and that it had no way to regulate the fans,⁶ is clearly the exercise of concerted protected action. As recently stated by the United States Court of Appeals for the Fifth Circuit in *Brown & Root, Inc. v. N.L.R.B.*, 634 F.2d 816 (1981), "Employees' activities are protected by Section 7 if they might reasonably be expected to affect terms or conditions of employment." In light of considerable testimony that the failure to operate exhaust fans resulted in smoke and fumes in the master rod department, protests lodged by Ryan on the master rod department employees' behalf unquestionably concerned conditions of employment and therefore constituted the exercise of protected activity.⁷ Further, based on the facts as found by the Administrative Law Judge, the record supports the finding that Ryan was fired precisely for engaging in the above-described protected activity. Thus, the week before Ryan's discharge Kendrick told Ryan that he could not regulate the fans and that Ryan could leave if he did not like it, and Kendrick himself testified, with respect to the day of Ryan's discharge, that he was "really pretty tired of hearing about [the fans]"—thereby identifying the determinative factor in Ryan's discharge as his advocacy of the employees' concerns. In addition, as employee Lauw testified, Kendrick stated

on the occasion of the discharge that he was tired of Ryan causing trouble about the fans, and that if Ryan did not like it he could leave and he would be fired.

While Ryan, as found by the Administrative Law Judge, persisted in arguing about the fans after he was told to return to work, we note that Ryan did in fact return to his workplace, followed by Kendrick. It is thus apparent that this is not an instance of an employee insubordinately disobeying a direct order to return to his workplace after being involved in a disagreement with another employee in which management had to intervene; rather, this is a case in which management discharged an employee for persisting in his advocacy of certain employee concerns after the employee had returned to his own work area. Indeed, Kendrick himself was largely responsible for prolonging the controversy. Not only did he fail to resolve the underlying problem which gave rise to the employees' concerns as voiced by Ryan,⁸ but he continued to carry on the discussion with Ryan after directing him to go back to work.

Finally, employee witness Austin testified that Kendrick had previously made a speech to the employees in which he invited employees to come to him directly with any problems which they might have. Austin stated that Kendrick made this speech when there was strife about a union coming in, and that he told the employees if there were any problems to bring them straight to him and he would handle it. Austin's testimony in this regard is un rebutted. Kendrick had, therefore, clearly invited the kind of discussion which Ryan was raising, and indisputably himself pursued the interchange in accompanying Ryan back to the master rod department enclosure. In these circumstances, we find that Ryan was still engaged in concerted protected activity when discharged by Kendrick.⁹ Accordingly, we find that Respondent violated Section 8(a)(1) of the Act by discharging Ryan for engaging in concerted protected activity by complaining to Respondent that fans needed to remain on in order to ventilate the work premises.

A. They were talking about the exhaust fans.

Q. All right. Can you tell us the words that they used—as best as you can remember—what each person said?

A. Well, Wes asked Mr. Kendrick to do something about it and Mr. Kendrick said: If you don't like it, there's the door. And Wes says: I don't want to leave; I want to see it corrected. Something else was said. I'm not sure. I had slipped with the master rod at the time and hit my knee, and I was sitting down in the chair. I'm not sure what else was said, but I remember Wes says: So what does this mean; am I fired? And Mr. Kendrick hesitated for a minute and said: Yes.

⁶ We particularly note in this regard that Hughes testified that the switches to four of the five exhaust fans are located in the shop for which he has supervisory responsibility.

⁷ *Carpet Corporation*, 191 NLRB 892 (1971).

⁸ Ryan was, of course, continuing to press for resolution of the dispute over working conditions which management had left to the employees to "fight out among themselves."

⁹ Nor would we find that the profanity engaged in by Ryan constituted insubordination removing him from the protection of the Act. Not only did Ryan's use of a profane epithet to describe Kendrick occur following his discharge, but Ryan testified without contradiction that Kendrick had earlier referred to him with a variation of the very same epithet. See *Brown & Root, Inc.*, 246 NLRB 33 (1979), *enfd.* 634 F.2d 816.

CONCLUSIONS OF LAW

1. The Respondent, Trans Air Supply Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discharging Charles W. Ryan, Jr., on February 12, 1980, because he engaged in protected concerted activity for the mutual aid or protection of himself and other employees, Respondent has violated Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It has been found that Respondent violated Section 8(a)(1) of the Act by discharging Charles W. Ryan, Jr., because he engaged in concerted protected activities for the mutual aid and protection of himself and other employees. We shall therefore order Respondent to offer Ryan immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and to make him whole for any loss of earnings suffered by reason of Respondent's unlawful conduct. Backpay shall be computed as provided in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Trans Air Supply Company, Inc., Miami, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging its employees for engaging in protected concerted activities in protest of conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Charles W. Ryan, Jr., immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights

and privileges, and make him whole for any loss of earnings suffered by reason of Respondent's unlawful conduct in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Miami, Florida, facility copies of the attached notice marked "Appendix."¹⁰ Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

¹⁰ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge our employees because they have engaged in concerted activities protected by the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer Charles W. Ryan, Jr., immediate and full reinstatement to his former job or, if that job no longer exists, to a substantial-

ly equivalent job, without prejudice to his seniority or other rights and privileges, and will make him whole for any loss of pay he may have suffered by reason of his discharge, with interest.

TRANS AIR SUPPLY COMPANY, INC.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge: This case was heard by me on June 30, 1980, in Coral Gables, Florida. The charge was filed on February 15, 1980. The complaint, which issued on March 14, 1980, alleges that Trans Air Supply Company, Inc. (herein called Respondent), discharged Charles W. Ryan, Jr., herein called the Charging Party, because Ryan engaged in protected concerted activities, by complaining to Respondent that fans needed to remain on in order to ventilate the work premises, in violation of Section 8(a)(1) of the Act.

Upon the entire record, my observation of the witnesses, and after due consideration of the briefs filed by General Counsel and Respondent, I hereby make the following:

Findings¹

This case involves an allegation that employee Charles Ryan was discharged because of his efforts to collectively negotiate with management regarding his and other employees' working conditions. During material times Ryan worked as a machinist in a department with three other employees.

According to Ryan's testimony, which was supported by the testimony of the General Counsel's other two witnesses, he and the other employees in his area expressed discomfort from time to time because of fumes or smoke. Ryan testified that the problem, which first arose in the fall of 1979, caused sore throats, runny noses, and burning eyes among the employees.

Because of the problem, Ryan was asked by some of his fellow employees to speak to management, and to specifically request that the exhaust fans² be left on so that the fumes and smoke could be cleared from their area.

Ryan testified that he first approached management during October or November 1979. According to Ryan, he complained to Foreman Clyde Hughes about the fumes in his work area. Ryan testified there was a partition, separating his work area from other areas, that there was a welder behind that partition, and that smoke

from the welding would rise and fall in his work area. Also, on the other side of Ryan's work area there was a spray booth that used kerosene, and the fumes would come out of the booth into his work area, plus fumes from coolants and other types of fluids that were being used to cool down the metal being machined by Ryan and his coworkers.

Ryan testified that following his complaint to Hughes, Hughes returned and indicated that another exhaust fan was going to be installed as soon as possible.³

Ryan testified that he again complained to management around November. On this occasion, Ryan complained to Plant Manager John Kendrick. Ryan testified that Kendrick agreed that he would see what could be done about the situation. Ryan testified that he also made the same complaint to Safety Director Clifford B. Hart.

From the testimony of Ryan, it appears that these original complaints which he lodged with Hughes, Kendrick, and Hart dealt with the installation of an additional exhaust fan. However, during December 1979, according to Ryan's testimony, a problem arose because the existing exhaust fans were not operating. Ryan testified that during December⁴ he spoke to Foreman Hughes about fumes which he felt were bad because the exhaust fans were not operating. Hughes informed him that he would talk to John (Kendrick) about the matter. Hughes also indicated in his response to Ryan's December complaint that some other employees had problems with the fans because of the cold temperatures. Apparently, a number of employees at Respondent's facility felt that the exhaust fans should not be operated because when they operated, the temperature or chill factor was adversely affected resulting in those employees becoming too cold to work comfortably.

Ryan testified that following his December conversation with Hughes about the fans not operating, he went in to talk to John Kendrick. While waiting for Kendrick to conclude a telephone conversation, he spoke with Fred Bensch. Bensch was stipulated to be a supervisor by the parties. Ryan informed Bensch that he was going to complain to Kendrick about the fans. Bensch replied, "Look, if you don't like it leave."

When Kendrick concluded his telephone call, Ryan asked him about leaving the fans on. According to Ryan, Kendrick replied that there was no way that he could regulate the fans. Kendrick then made a statement similar to that of Bensch, "Look, if you don't like it you can leave. The fumes aren't that bad." During that conversation, Kendrick told Ryan that OSHA came by and discovered that there was nothing harmful to the lungs, and OSHA discovered that the only problem Respondent had was that one machine was making too much noise.

Other testimony, which was generally un rebutted, indicated that the controversy regarding the operation of

¹ Respondent, which is engaged in the business of selling and overhauling airplane engines and parts at its Miami, Florida, facility, admitted both the commerce allegations and the supervisory allegations of the complaint. On the basis of that admission, I find that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act.

² The entire work area is serviced by several large fans, each of which is 4 feet in diameter. The fans on one side of the building are intake fans, while the opposite wall contains several exhaust fans. One of the exhaust fans was located in the immediate area of Charles Ryan's work station.

³ This testimony convinces me that Respondent's witnesses' testimony that the problem regarding the fans being left off did not arise until February 1980. Hughes' response that another fan would be installed demonstrates to me that the problem during October and November involved, if anything, a situation where the existing fans were not adequate.

⁴ Although Ryan placed this conversation during December, he admitted on cross-examination that the conversation could have occurred on February 5, 1980.

the fans first surfaced on February 5, 1980, as a dispute among employees.⁵ February 5 was a cold, uncomfortable day. On that day, according to witnesses of Respondent, Charles Ryan complained about the fans not operating. Pursuant to a directive from Plant Manager Kendrick, Clyde Hughes took a vote among the available employees as to whether they wanted the fans off or on. A majority of the employees voted to operate the fans.

Following the vote, Hughes turned on two fans on the east wall and four on the west wall. However, some of those fans were subsequently turned off by someone. After the fans were turned on, three employees, including Domingo Fernandez, John Austin and Charles Ryan, went home prior to the conclusion of their workday. Fernandez told Hughes that "it was too cold and he was going home." Additionally, some other employees complained to Hughes that it was too cold.

Charles Ryan's last day of employment was February 12. Foreman Hughes testified that the fans were on and an employee came to him and complained that it was cold. Hughes testified that he went into his office, and when he came out, the fans had been turned off. Charles Ryan told him that he wanted the fans on because it was too smoky. Hughes testified that he went into the weld shop and turned on the fan, which was immediately above Ryan's work area. Hughes testified that when he came out, Ryan "and Domingo [Fernandez] were facing each other off; there was a lot of loud talking." Hughes testified that he told the two employees to return to work. However, Ryan continued to contend to Hughes that the fans should be turned on. Plant Manager Kendrick walked up and entered the conversation with Ryan. Hughes testified that he left to finish some paperwork at that point during the conversation.

Kendrick testified that it came to his attention that "there was a big scene taking place outside between Domingo and Wes,"⁶ and there were clenched fists and a steel bar being brought into play." Kendrick testified that he went to Clyde Hughes, and Hughes told him that the fans have been off and on throughout the morning. Kendrick said that Hughes told him that he had tried to resolve it by turning on the fan that was adjacent to Ryan's work area.

Kendrick testified that he did have a conversation with Ryan, that he told Ryan that he had had enough difficulty with the fans, and that he was really pretty tired of hearing about them. Kendrick said that he told Ryan that he was going to leave the one fan on (apparently the fan nearest Ryan's work station) and that he was going to leave the other three fans off. According to Kendrick, Ryan then asked, "Well, how about the vote?" Kendrick said that he told Ryan that some of the older employees were complaining about the cold, and he had to respect their feelings as well as Ryan's. Kendrick said he told Ryan a couple of more times that that was the way it was going to be; and he suggested that Ryan go back to work, that he could not tolerate Ryan walking off the

job anymore.⁷ According to Kendrick's testimony, Ryan continued to "harass me about the fans, and [Ryan] asked me straight on: 'Are you firing me?'" Kendrick said that he denied he was firing Ryan. Afterward, Ryan again asked if Kendrick was firing him and Kendrick replied, "No, he was not." According to Kendrick, at that point Ryan gathered up his tools and proceeded out the door.

Kendrick testified that a few minutes after the above incident Mr. Bensch came in and told him that "Mr. Ryan was laying on the floor out there."⁸ Kendrick testified that he went out and said to Ryan, "You're something else, aren't you?" According to Kendrick, Ryan told him that he was "a big cock sucker." Ryan told Kendrick that he was going to have to send him to a doctor. Following further words between Kendrick and Ryan, Ryan was escorted to visit the doctor by Foreman Hughes.

Charles Ryan testified concerning the incidents of February 12. According to Ryan, he was again asking John Kendrick about the fans. Kendrick told him that there was no way that they could regulate the fans, that the employees would have to work it out between themselves. According to Ryan, Charles Hughes left the conversation. Shortly thereafter, he and Kendrick went over to the end of Ryan's shop area, and Kendrick told him that he was fired. Ryan testified that he asked Kendrick, "Are you firing me because you can't turn the fans on?" Kendrick replied, "Look, you're fired. Get out, you're fired."

Former employee Nico Lauw testified that he worked in the shop with Charles Ryan during times material to these proceedings. Lauw testified that he overheard the conversation between Ryan and Kendrick on February 12. Lauw testified that Ryan and Kendrick walked into the master rod department and they were arguing over the fact that one of the fans was not turned on with the smoke building up inside the shop. Lauw testified that:

Mr. Kendrick came in and started talking to Charles about how Charles was causing trouble again, and he was tired of seeing Charles causing trouble. He wanted to know what was going on this time, and Charles said that last time that Mr. Kendrick would not turn the fans on, so he had to go out and have a vote to have it done. This time, he didn't even try and turn it on again. Then Mr. Kendrick was telling Wes that if he didn't like it, he could pick his tool box up and leave and he'd be fired. And Charles said he didn't want to leave because he liked working there, and he was the only one doing good work for Clyde Hughes. And after that, the next thing I heard was: Mr. Kendrick said Charles was fired anyway. And Charles said that if he was fired, he wanted his paycheck right now according to the law.

⁵ On cross-examination Charles Ryan indicated that the events may have occurred during February, rather than in December (see fn. 4, *supra*).

⁶ Charging Party Charles Ryan is also known as "Wes."

⁷ According to Kendrick's testimony, he was referring to the February 5 incident, when Ryan left work early.

⁸ The testimony reflected that as Ryan was leaving he slipped and fell on the floor.

Former employee John Austin also worked in the machine shop with Charles Ryan during material times. Austin testified that he heard Charles Ryan and Kendrick talking about the exhaust fans on February 12. Austin testified that:

Wes asked Mr. Kendrick to do something about it and Mr. Kendrick said: "If you don't like it, there's the door." And Wes says: "I don't want to leave; I want to see it corrected." Something else was said. I'm not sure. . . . I'm not sure what else was said, but I remember Wes says: "So what does this mean; am I fired?" And Mr. Kendrick hesitated for a minute and said: "Yes."

On cross-examination, Austin admitted that, in his pre-trial affidavit to the Board, he testified that during the February 12 conversation he overheard Charles Ryan say, "I don't want to leave, I want to see it corrected. . . . If I turn the fans on, does that mean I'm fired? Kendrick answered yes."

Conclusions

I have concluded on the basis of the record evidence that Charles Ryan was not discharged because of activity protected by Section 7 of the Act.

In order to support the complaint allegations, the General Counsel must show that Respondent in discharging Ryan was motivated by factors protected by Section 7. Contrary to Respondent's contention, I am persuaded that Ryan was discharged by Plant Manager Kendrick on February 12. Three witnesses—Ryan, Lauw, and Austin—heard Kendrick mention that Ryan would be, or was being, discharged on that date. Moreover, when asked if Ryan informed him on February 12 that Kendrick had fired Ryan, Foreman Clyde Hughes was evasive in his answer. Hughes was asked, "Did (Ryan) ever indicate to you that John Kendrick fired him?" Hughes answered, "On the trip to the doctor, he tried to discuss it with me." Therefore, I am persuaded that Kendrick's testimony that he did not fire Ryan cannot be believed.

Nevertheless, I find that the General Counsel failed to prove that Ryan's concerted activities led to or contributed to his discharge.

By Ryan's own testimony, he had, at various times since October or November 1979, complained about fumes in the work area. The record does not reflect that those complaints upset anyone in management. In fact, Ryan was told that Respondent was in the process of trying to correct the situation.

However, when the weather turned cold around February 1980, a controversy arose between various factions of employees regarding the fans. Ryan and others were bothered by fumes and smoke and wanted the fans on. Other employees, including Domingo Fernandez, felt

that the running of fans contributed to the cold weather in the plant to such a degree that they could no longer work without being uncomfortable. That controversy resulted in Ryan and Fernandez engaging in an argument, which reached the verge of a fight on February 12.

The evidence is un rebutted that management was conscientiously trying to resolve the employees' conflict during February regarding the fans. On February 5, Clyde Hughes took a vote among employees to determine whether a majority favored running the fans or not. Subsequently, when Hughes turned on some of the fans, someone, perhaps an employee, or employees, would surreptitiously turn the fans off. As late as February 12, Hughes was taking steps in the hope of resolving the controversy. Hughes turned the fans on in Ryan's immediate work area while leaving the fans off in other areas. Therefore, I am convinced from the evidence that management was appreciative of the problem regarding the fans.

However, after Clyde Hughes broke up the February 12 incident between Ryan and Fernandez, and directed the two to return to their work, Ryan persisted in arguing with Hughes. Thereafter, when Kendrick walked up, Ryan continued to argue as he had apparently done with Domingo Fernandez.⁹ According to Ryan's testimony, Kendrick told him that there was no way they could regulate the fans.

I am not convinced, on the basis of the entire record, that Ryan was fired for any reason other than his persistence in arguing with Kendrick, after he had almost fought with another employee, and after he had been told by both Hughes and Kendrick to return to work. It is apparent that Respondent was doing its best to resolve a situation that involved conflicting views among the employees. There must be a point in such a situation where an employer may, with impunity, take action required to restore order and resume its business operations. That appears to me to be the situation here.¹⁰

CONCLUSIONS OF LAW

1. Respondent Trans Air Supply Company, Inc., is an employer engaged in commerce and activities affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent has not engaged in any unfair labor practices alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

⁹ Although I have discredited Kendrick's testimony that he did not fire Ryan, I credit his and Clyde Hughes' testimony that Ryan persisted in arguing with them after he was told to return to work. No testimony was offered in rebuttal of their testimony in that regard.

¹⁰ Compare *Napoleon Steel Contractors, Inc.*, 194 NLRB 783 (1971).